No. 78-689

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALEXANDER SHARP, II, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, APPELLANT

v.

CINDY WESTCOTT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE FEDERAL APPELLEE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

Constitution, statutes and regulation:

Miscellaneous: Page

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-689

ALEXANDER SHARP, II, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, APPELLANT

v.

CINDY WESTCOTT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE FEDERAL APPELLEE

OPINION BELOW

The order of the district court (J.S. App. 13a-14a) is not reported.

JURISDICTION

The order of the district court was entered on August 9, 1978 (J.S. App. 13a-14a). A notice of appeal to this Court was filed on August 24, 1978 (J.S. App. 15a), and the appeal was docketed on October 23, 1978. Probable jurisdiction was noted on December 11, 1978. The jurisdiction of this Court is

invoked under 28 U.S.C. 1252 because of the pendency of an appeal (*Califano* v. *Westcott*, No. 78-437) from the district court's order of April 20, 1978, declaring unconstitutional and enjoining the Secretary of Health, Education, and Welfare from enforcing part of 42 U.S.C. 607.

QUESTION PRESENTED

The district court held that Section 407 of the Social Security Act, which provides benefits to two-parent families in which a dependent child is deprived of parental support because of the unemployment of his father but does not provide benefits when the mother becomes unemployed, violates the Due Process Clause of the Fifth Amendment.

The question presented is whether the district court erred in holding that the gender distinction should be remedied by the extension of benefits to two-parent families in which a dependent child is deprived of parental support because of the unemployment of either parent, rather than the extension of benefits to only those two-parent families where the principal wage-earner parent is unemployed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 407 of the Social Security Act, 42 U.S.C. 607, is set forth in the Appendix to the Secretary's brief in No. 78-437.

STATEMENT

The statutory framework and most of the pertinent facts are set out in the Secretary's brief in No. 78-437. We recount here only the additional facts pertinent to this appeal.

The district court concluded, in light of the congressional commitment to the goal of aiding needy children where there is parental unemployment, and the disruptive effect of cancelling the AFDC-UF program, that the proper remedy (given its holding that the gender distinction drawn by Section 407 violates the Due Process Clause) is the extension of the AFDC-UF program to all families with needy dependent children where either parent is unemployed within the meaning of the Act and implementing regulations.

On June 7, 1978, appellant moved for clarification or modification of the district court's order to permit the adoption of a state plan providing benefits only to families with dependent children who were deprived of parental support by reason of the unemployment of the parent who had been the principal wage-earner.

On August 9, 1978, the district court declined to amend its order, concluding (J.S. App. 13a) that any further reformulation of the statutory scheme beyond deletion of the gender distinction was a matter for Congress, and that Massachusetts is " 'not free to narrow the federal standards that define the cate-

gories of people eligible for aid' under the AFDC program," quoting *Quern* v. *Mandley*, 436 U.S. 725, 740 (1978).

SUMMARY OF ARGUMENT

The district court correctly concluded that, in remedying what it found to be an unlawful gender distinction between unemployed fathers and mothers in Section 407, it could not authorize the adoption of a state AFDC-UF plan that would exclude an unemployed parent who is not the principal wage-earner in the family. Section 407 gives the Secretary of Health, Education, and Welfare—not the states—the authority to set definitions of parental unemployment beyond the minimal statutory criteria. A state may not narrow or restrict the categories of persons, established by federal law, who are eligible for AFDC benefits. The current federal regulations, adopted pursuant to the authority delegated to the Secretary, do not permit the states to exclude a parent who otherwise meets federal standards just because he is not the principal wage-earner in the family.

The district court did not purport to restrict the Secretary's authority to define "unemployment" in any gender-neutral way. If the decision holding Section 407 to be unconstitutional is affirmed, the Secretary would then consider whether and how to redefine the term "unemployment" in order to administer an unemployed parent—rather than an unemployed father—program.

ARGUMENT

A STATE AFDC-UF PLAN MUST INCLUDE ANY FAMILY WITH A PARENT WHO MEETS THE FEDERAL DEFINITION OF UNEMPLOYMENT, AND THE CURRENT FEDERAL REGULATIONS DO NOT PERMIT THE ADOPTION OF A STATE PLAN THAT EXCLUDES AN UNEMPLOYED PARENT WHO IS NOT THE PRINCIPAL WAGE-EARNER IN THE FAMILY

A. Section 407 Establishes Certain Criteria For The Definition Of Parental Unemployment, And It Leaves To The Secretary Further Definition Of The Term "Unemployment"

Section 407 of the Social Security Act, 42 U.S.C. 607, gives the Secretary of Health, Education, and Welfare, not the States, the authority to set standards of coverage in cases of parental [1] unemployment not specifically governed by the criteria established in the statute.[2] Section 407(a) defines the term "dependent

---

[1] Although Section 407 refers to the unemployment of a needy child's "father," the question of remedy arises only if, as the district court held, the gender distinction employed in Section 407 violates the Due Process Clause, and the Section must be given a gender-neutral construction. For the purposes of our discussion of the remedy if Section 407 is held unconstitutional, we will use the gender-neutral terms "parent" and "parental" in discussing the requirements of Section 407 and the implementing regulations.

[2] Section 407 requires, *inter alia*, that the unemployed parent show that he has worked during at least six of the 13 quarters ending within one year of his application for aid, or that he received or was qualified to receive unemployment compensation within one year prior to his application for aid. 42 U.S.C. 607(b)(1)(C). Section 407 also provides, in effect, that a parent is not unemployed for purposes of that Section

child" to include "a needy child who meets the requirements of [42 U.S.C. 606(a)(2)] who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *."

The establishment of federal standards for "unemployment" was a deliberate change from prior practice. The temporary legislation that preceded Section 407 had left the definition of parental unemployment to the states. See the Act of May 8, 1961, Pub. L. No. 87-31, 75 Stat. 75.[3] When Section 407 was adopted as permanent legislation, Congress concluded that "the wide variation in the definitions used by the States" had "worked to the detriment of the program," and accordingly it adopted a uniform federal definition of unemployment. H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967). See *Batterton* v. *Francis*, 432 U.S. 416, 419 & n.4 (1977); *Philbrook* v. *Glodgett*, 421 U.S. 707, 710 & n.6 (1975).

As this Court concluded in *Batterton* v. *Francis*, *supra*, 432 U.S. at 425, in exercising the delegated "power to prescribe standards for determining what

---

if he has refused a bona fide offer of employment or training for employment without good cause within a period prescribed by the Secretary. 42 U.S.C. 607(b)(1)(B). The parent also must be registered with the state public employment office before his child may receive benefits. 42 U.S.C. 607(b)(2)(C).

[3] The Act provided that the term "dependent child" included a needy child "deprived of parental support or care by reason of the unemployment (as defined by the State) of a parent * * *." 75 Stat. 75.

constitutes 'unemployment' for purposes of AFDC-UF eligibility," the Secretary has the authority not only to interpret the statutory terms, but also to adopt "regulations with legislative effect."

B. The Secretary's Regulations Do Not Permit States To Adopt Plans Limited To Families With Unemployed Parents Who Have Been Principal Breadwinners

The regulations promulgated by the Secretary do not give the states the option of adopting plans that provide assistance only where the parent who had been the primary wage-earner in the family becomes unemployed. To the contrary, the regulations now in force require that each participating state adopt a definition of unemployed father that "must include any father" who meets stated requirements. 45 C.F.R. 233.100(a)(1). That regulation, with a sex-neutral construction, requires that a state plan include any parent who meets federal requirements of "unemployment." No federal rule requires an "unemployed" father (or parent) to show that he has been the principal wage-earner in the family.

C. The District Court Correctly Concluded That It Could Not Authorize The Adoption Of A State Plan That Would Narrow The Federal Standard Of Eligibility For Aid

The district court rejected appellant's request that it clarify or (if necessary) modify its initial remedial order to permit the state to adopt a gender-neutral plan limited to families in which the unemployed parent was the principal family wage-earner. It con-

cluded, properly we submit, that Section 407 vests in the Secretary—not the individual states—the authority to set the standards for the parental unemployment necessary to make a family eligible for AFDC benefits. Appellant thus may not adopt a plan that would " 'narrow the federal standards that define the categories of people eligible for aid' under the AFDC program." J.S. App. 13a, quoting *Quern* v. *Mandley*, 436 U.S. 725, 740 (1978). See *Philbrook* v. *Glodgett*, *supra*, 421 U.S. at 719; *Burns* v. *Alcala*, 420 U.S. 575, 578 (1975); *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971); *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968). Appellant's request that the Court fashion a *cy pres* remedy and establish the plan "Congress [would] have established if it had known of section 407's [unconstitutionality] when it enacted that statute" (Br. 10) should be declined, because Congress prescribed a specific device for filling statutory gaps. That device is the issuance of regulations by the Secretary. The Secretary, not the Court, must decide whether and how "unemployment" should be redefined in light of any constitutional flaw in the statute. Cf. *Stanton* v. *Stanton*, 421 U.S. 7, 17-18 (1975); *Orr* v. *Orr*, No. 77-1119 (Mar. 5, 1979).

Appellant contends that the district court erred in refusing to authorize the state to adopt plans limiting benefits to families in which the primary wage-earner is unemployed. He urges (Br. 14-26) that the legislative history of Section 407 demonstrates that Congress intended to provide aid to children in families in which the breadwinner was unemployed, and that

an unqualified extension of Section 407 to families where either parent is unemployed would broaden the AFDC program beyond Congress' intent. Appellant also urges (Br. 34-37) that the district court failed to consider the greatly increased cost of extending AFDC benefits to families where either parent is unemployed, which, appellant argues, supports the view that Congress would respond to the deletion of the gender distinction in Section 407 by limiting benefits to families where the primary wage-earner is unemployed.

Appellant does not argue, however, that the Secretary's regulations—interpreted as we have done here—are unlawful. The district court therefore correctly concluded that appellant's arguments are beside the point, given the structure of Section 407, which leaves any further definition or restriction of the term unemployment—beyond the minimal statutory criteria—to the Secretary. The district court did not purport to restrict the Secretary's authority to define "unemployment" in any gender-neutral way. If the decision holding Section 407 to be unconstitutional should be affirmed, the Secretary then would consider whether to adopt additional criteria for defining unemployment (or to seek remedial legislation) in light of the additional costs imposed and the other problems appellant foresees in the administration of an unemployed parent program.[4] Of course, any state dissatis-

---

[4] Among other alternatives, the Secretary would consider the adoption of a principal wage-earner test.

fied with the federal standard remains free to withdraw from the program.

CONCLUSION

If the Court affirms the judgment in *Califano* v. *Westcott*, No. 78-437, then it should affirm the order challenged here. If it reverses the judgment in No. 78-437, it should vacate the order challenged here.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 288169 353